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Supreme Court, U.S.
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No. 97-293

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

HERMAN CORN, Trustee

Petitioner,

v.

CITY OF LAUDERDALE LAKES, et al.

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Through his Petition, Corn[1] has asked this Court to grant certiorari to consider the following takings issues, which have never been decided by this Court:

1. If, pursuant to state law, a landowner has a vested right to build a particular project on his land, in which vested right the landowner has a constitutionally protected property interest, must just compensation be paid if a city confiscates the right to build the project, even if the land can be put to other uses?

2. Has a landowner been temporarily deprived of all use of his property for over seven years when he successfully litigates with the city during that time and establishes his right to develop his property in a fashion which the city has wrongfully prohibited?

3. Can the enactment and enforcement of invalid ordinances and the wrongful rejection of a site plan which prevents a landowner from developing his property for an allowed use ever substantially advance a legitimate state interest?

4. Does the Dolan rough proportionality standard apply to the exaction of vested rights to build a project as a condition to the development of land?

This Court has identified, without deciding, the first two issues. The last two issues have not been specifically addressed by this Court and are the subject of disagreement and debate among the federal courts.

The City's Brief in Opposition never addresses any of

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[1]Corn shall employ the same terms herein to have the same defined meanings as they were given in Corn's Petition.

these issues. Accordingly, the City's Brief in Opposition fails to explain why these issues should not be addressed and resolved by this Court through the granting of certiorari.

I. The Lucas denominator in the deprivation fraction - a vested right to build a particular project is a constitutionally protected property interest for which just compensation is due for its confiscation.

A. Corn was denied all use of his constitutionally protected property interest in the Project.

The City acknowledges that through the state court litigation it was conclusively established that Corn had a vested right to build the Project. Brief in Opposition at 6. The City also acknowledges that in Corn IV the Eleventh Circuit affirmed that Corn had vested rights in the Project. Id. at 12. Thus, there is not any factual dispute that Corn had a vested right to build the Project.[2] Indeed, there is no disagreement that for over 7 years the City prevented Corn from building the Project, thereby confiscating his vested right for this period of time. The City simply argues that Corn is not entitled to just compensation for the confiscation of his vested right to build the Project, even if this vested right is a constitutionally protected property interest because after July, 1978, the Property could be put to other uses.

Significantly, the City never addresses or disputes the

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[2]Nonetheless, surprisingly, the City unsuccessfully attempts to take issue with Corn's statement that in excess of $100,000 was spent specifically developing the Property, and not for preparatory work done on the entire 261 acre parcel, see Brief in Opposition at 17 n.5, despite explicit findings of fact that these funds were spent solely for development of the Property included in both in the State Court Final Judgment (App. G-3), and the First Final Judgment (App. D-2).

following:

1. Constitutionally protected property interests are defined by state law,

2. As a matter of Florida law, Corn's vested right to build the Project is a constitutionally protected property interest, and

3. The City's confiscation of Corn's vested right to build the Project deprived him of a constitutionally protected property interest for which he is entitled to just compensation.[3]

The City does not address the issue presented in this cause, and identified and left unresolved by this Court in Lucas, of whether Corn's constitutionally protected vested right to build the Project is the proper "denominator in the deprivation fraction". See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992). The City also ignores the significance to his takings claim of Corn's vested rights. See Williamson County Regional Planning Commission, 473 U.S. 172, 191 (1985).[4] Instead, without

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[3]The City does feebly refer to Corn IV and the statement that certain property interests may not be taken without due process yet may be taken without just compensation. Brief in Opposition at 14. The City does not, however, support this proposition or address or refute the Supreme Court cases cited in Corn's Petition which establish that 'property' is defined identically pursuant to the due process clause and takings clause. See Petition at 16, n.9.

[4]In Corn IV, the Eleventh Circuit confirmed that this Court has not resolved this issue, stating:

> The Supreme Court has expressed no view on the proper test to be applied to a takings claim based on a vested rights theory. Williamson County Regional Planning Commission, 473 U.S. at 191 n.12, 105

any analysis or explanation, the City simply relies upon the general proposition that for there to be a compensable taking a landowner must be denied all use of his property, maintaining:

> Even if Corn was deprived of something constituting a traditional Fifth Amendment "property right", he would not recover unless he could show that the deprivation of that right affected his interest in the property as a whole. Brief in Opposition at 16.

The City never explains this untenable position, which simply begs the issue. Since Florida law creates a constitutionally protected property interest in the vested right to build a particular project, how can a city confiscate that property interest without being compelled to pay just compensation pursuant to the Fifth Amendment? What exempts a city's taking of this property right from the constitutional obligation to pay just compensation? If the vested right to build a project is a constitutionally protected property interest just compensation must be paid for its taking, irrespective of whether the landowner was deprived of all use of his land.

The City unquestionably denied Corn all use of his constitutionally protected property interest in his right to build the Project for over seven years. There is no issue of the "degree of deprivation" as suggested by the City, see Brief in Opposition at 19, since the deprivation of Corn's property interest was complete. While there were other uses to which Corn could have put the Property during the pendency of the state court litigation, it is undisputed that the

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Supreme Court at 3119, n.12. (App. A-16, Corn IV).

City completely deprived Corn of his constitutionally protected property interest in the Project. Corn is entitled to be compensated for the property interest that was confiscated from him, irrespective of what he retained. See Kimball Laundry Company v. United States, 338 U.S. 1, 17 (1949)(owner's loss measured by isolating value of property interest taken as component of overall fair market value of affected property); United States v. General Motors Corp., 323 U.S. 373, 378 (1945)(owner's loss measured by extent to which governmental action deprives him of an interest in property).

In this regard, the City cites the cases of Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir. 1981), cert. denied, 456 U.S. 973 (1982), and AA Profiles, Inc. v. City of Fort Lauderdale, 850 F. 2d 1483 (11th Cir. 1988), cert. denied, 490 U.S. 1020 (1989), identifying these as cases involving regulation so onerous as to be confiscatory measures. Brief in Opposition at 19. In both of these cases, the owners' regulations confiscated a proposed project, and left the property owners with the ability to develop their property for other uses. Wheeler v. City of Pleasant Grove, 896 F.2d 1347, 1351 (11th Cir. 1990)(the unconstitutional taking court found compensable was not a denial of all use of the property); AA Profiles, 850 F.2d at 1485. In both of these cases the right to develop a specific project was confiscated and was determined to be compensable pursuant to the Fifth Amendment, despite the fact that there were alternative uses to which the property could be put. This is precisely what happened to Corn. This is precisely the issue Corn seeks to have this Court approve and the City chooses to ignore.

The City suggests that Corn's claim is a dangerous one because it would require government to pay just

compensation "whenever it deprives someone of a property interest, regardless of whether the deprivation violated due process or any other constitutional rights". Brief in Opposition at 19-20. The City misses the point. If governmental action deprives someone of a protected property interest, there has been a violation of constitutional rights, in which event compensation is mandated. If a government's regulation restricts a landowner's use of property without confiscating a constitutionally protected property interest, no compensation is due. No city shall be "crippled", as expressed by the City, if it is compelled to comply with the United States Constitution and compensate a landowner for confiscating a constitutionally protected property interest.

B. Corn was deprived of all use of the Property.

Further, the City completely ignores Corn's argument that he was deprived of all use of the Property throughout the pendency of the state court litigation because he could not be compelled to sacrifice his constitutional right to build the Project and moot his state claims by being lawfully compelled to develop the Property for some alternative use. See Petition at 23-24. Corn could not put the Property to any economically viable use while he awaited the successful outcome of the state court litigation. The City's unlawful denial of the Site Plan proximately caused Corn's loss. Just compensation is due.

Since there is no dispute whatever that Corn had a vested right to build the Project and that Florida law affords such vested right constitutional protection as a property interest, this case provides the Court with the opportunity to answer the questions identified and left unresolved in both Lucas and in Williamson County. Corn respectfully requests

this Court to grant certiorari to address and resolve these issues.

II. The City's successful thwarting of the development of the Project did not substantially advance any legitimate state interest.

Preliminarily, the City wrongfully maintains that this Court's denial of Corn's earlier Petition for Writ of Certiorari has some preclusive effect on the Court's consideration of Corn's current Petition. Contrary to the City's contention, the denial of a writ of certiorari in ongoing litigation does not prevent the raising of all issues in a case in a later filed petition. Mercer v. Theriot, 377 U.S 152, 153 (1964). Further, a denial of a writ of certiorari is no expression on the merits of the issues raised. United States v. Carver, 260 U.S. 482, 490 (1923). Accordingly, this Court's denial of Corn's earlier Petition for Certiorari has no impact whatever on this Court's ability to grant certiorari to consider Corn's substantive due process issues.

Corn maintains that he is entitled to just compensation pursuant to the Fifth Amendment for the taking of the Property because the City's denial of the Site Plan did not substantially advance any legitimate state interest. This case provides the Court with an opportunity to identify the burden of proof and legal standard applicable to such claims.

Again, the City simply ignores the issues raised by Corn. The City makes no effort to explain how the enactment of invalid ordinances and rejection of the Site Plan which were designed to thwart the development of the Project could serve to substantially advance any legitimate state interest. The City does not explain how invalid city

legislative and administrative action can nonetheless pass constitutional muster.

In takings cases decided by this Court, the Court has addressed and identified when otherwise valid regulation goes too far and effects a taking of property because it does not substantially advance a legitimate state interest. This case provides the Court with the vehicle through which to explain when and whether invalid regulation can ever serve a legitimate state interest, or effects a compensable taking.

This case also affords the Court the opportunity to explain the level of scrutiny and burden of proof to be applied in such a takings case. In Dolan v. City of Tigard, 512 U.S. 374 (1994), this Court identified the level of scrutiny and burden of proof applicable to the takings claim presented. Since Dolan, lower courts are in conflict regarding the applicability of Dolan in different types of takings claims.[5] This case provides the Court with the opportunity to resolve this debate.

In its Brief in Opposition the City does not explain why Dolan is not applicable to Corn's claim. The City does not dispute that its rejection of the Site Plan was administrative and not legislative conduct. The City concedes that its conduct was designed to prevent Corn from developing the Project; nonetheless, the City does not attempt to explain how this wrongful exaction differs from that involved in Dolan.

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[5]E.g. Parking Association of Georgia v. City of Atlanta, 515 U.S. 1116, 1116 (1995)(Thomas dissenting).

CONCLUSION

Corn has suffered a substantial injury as a result of the City's enforcement of invalid ordinances and wrongful rejection of his Site Plan which confiscated his Project and took his Property. Corn's loss has not been compensated to date because the state of takings law is such that unless a case clearly fits into a "pigeonhole" which has been clearly defined by this Court, the lower courts lack sufficient direction to properly interpret and apply the Fifth Amendment takings clause. There are many unanswered questions in taking jurisprudence. Certain of these questions have been identified by this Court. These questions have been left unanswered because a case squarely presenting the issue has not heretofore made its way to this Court.

This case squarely and cleanly presents certain of these issues. The conclusive factual findings made through the state court litigation, the record developed in federal court and the legal issues which have been defined provide this Court with the opportunity to advance and clarify the status of takings jurisprudence.

Corn respectfully requests that this Court grant certiorari of his Petition.

DATED: October 29, 1997

Respectfully submitted,

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